IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HON'BLE THE ACTING CHIEF JUSTICE MR.K.S.RADHAKRISHNAN
&
THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

FRIDAY, THE 13TH APRIL 2007 / 23RD CHAITHRA 1929

WA.No. 212 of 2007(B)

AGAINST THE JUDGEMENT IN WPC.15859/2006 Dated 07/11/2006
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APPELLANT: PETITIONER IN WRIT PETITION

STATE BANK OF TRAVANCORE,
PUNALUR 691 305, REPRESENTED BY ITS
CHIEF MANAGER.

BY ADV. SRI.M.PATHROSE MATTHAI (SR. ADVOCATE)
SRI.JACOB P.ALEX
SRI.RADHIKA RAJASEKHARAN P.

RESPONDENTS: RESPONDENTS IN WRIT PETITION
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1. THE RECOVERY OFFICER,
EMPLOYEES STATE INSURANCE CORPORATION,
REGIONAL OFFICER (KERALA), PANCHDEEP BHAVAN,
NORTH SWARAJ TOWN, TRISSUR-680 020.

2. TAHASILDAR, PATHANAPURAM TALUK,
PUNALUR.

3. THE RECOVERY OFFICER (RECOVERY),
EPF ORGANIZATION, PATTOM, THIRUVANANTHAPURAM-4.

4. THE RECOVERY OFFICER,
DEBTS RECOVERY TRIBUNAL, KSHB BUILDING,
PANAMPALLY NAGAR, COCHIN-682 036.

5. TRAVANCORE PLYWOOD INDUSTRIES LTE.,
PIRAVANTHOOR P.O., PUNALUR-691 305.

6. STATE OF KERALA, REPRESENTED BY
THE CHIEF SECRETARY, GOVERNMENT OF KERALA,
GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM.

R1 BY ADV. SRI.N.N.SUGUNAPALAN (SR.)
SMT.T.N.GIRIJA, SC,EPF ORGANISATION
R4 BY ADV. SRI.K.JAYAKUMAR
ADV. SRI.P.B.KRISHNAN
ADV. SRI.P.SANKARANKUTTY NAIR, SC, ESI CORPN

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 30/03/2007, ALONG WITH WA NO. 259 OF 2007 THE COURT ON 13/04/2007 DELIVERED THE FOLLOWING:

K.S. RADHAKRISHNAN, Ag. C.J. & M.N. KRISHNAN, J.

Writ Appeal Nos. 212 and 259 of 2007

Dated: 13th April, 2007.

JUDGMENT

Radhakrishnan, Ag. C.J.

Constitutional validity of Sections 26A and 26B of the Kerala General Sales Tax Act, 1963 is under challenge in both the appeals. Writ Appeal No 212 of 2007 is preferred by the State Bank of Travancore and Writ Appeal No 259 of 2007 by the State Bank of India. Both the Banks challenge the statutory first charge claimed by the State of Kerala towards sales tax over the claims made by the Bank on the strength of the mortgages created by the donees in their favour. Right of the State Government to get priority in the matter of recovery of sales tax from the defaulters over equitable mortgages created by them in favour of banks and financial

institutions is no more res integra. Dealing with the provisions parallel to Section 26 B of the Kerala General Sales Tax Act, 1963 by the various sales tax laws of other States, the Supreme Court has already recognised the statutory first charge in respect of sales tax arrears. Reference may be made to the decisions of the apex court in State Bank of Bikaner & Jaipur v. National Iron & Steel Rolling Corporation (1995) 96 STC 612), Dellhi Auto and General Finance Pvt Ltd v. Tax Recovery Officer and others (1999) 114 STC 273), Dattatreya Shanker Mote v. Anand Chintamani Dattar (1974) 2 SCC 799), Dena Bank v. Bhikhabhai Prabhudas Pareksh Co. (2000) 5 S.C.C. 694), State of M.P. v. State Bank of Indore (2002) 10 SCC 441) etc. Scope of Section 26B also came up for consideration before this court in State of Kerala v. Rajmohan Cashew (P) Ltd. (2005 (2) KLT 131) and this court upheld the first charge of the State under Section 26B over the right created in favour of a banking institution. This court took the view that the provisions of the RDB Act, 1993 have no overriding effect over Section 26B of the Kerala General Sales Tax Act, 1963. Same is the view Jaya v. State of Kerala 2005 (2) KLT 543). This court took the view that the decree obtained by the Bank will not have precedence over the first charge

created in favour of the State under section 26B of the Kerala General Sales Tax Act. This court held as follows:

> "Section 26A was introduced by the State Legislature to get over the attempt of the assessee to create a charge on or parts with the possession by way of sale, mortgage, gift, exchange or any other mode of transfer whatsoever of any of his assets in favour of any other persons so as to get over any claim in respect of any tax or any other sum payable by the assessee under the Act. We are of the view State Legislature is competent to enact such provision in exercise of its legislative power under Entry 54 of List II of the 7th Schedule read with Art 246 of the Constitution of India. Section 26A does not restrict or purport to impose any restriction on any freedom of trade by the citizen of the country, but only to safeguard public interest. Apart from the provisions of Section 26A, there are provisions in Revenue Recovery Act itself to proceed against the transfer of property to defeat the claim for tax arrears."

Senior Counsel appearing for the appellant Shri Pathrose Matthai submitted that in the above mentioned case this court has not considered the overriding effect of the RDB Act over the Kerala General Sales Tax Act. Counsel submitted that RDB Act and the State Bank of India Subsidiary Banks Act are enacted by the Parliament under entry 45 of list 1 of VII schedule of the Constitution of India and by virtue of the provisions of Article 246 (1) of the

Constitution the said law enacted by the Parliament with respect to entry 45 of List I has overriding effect and prevails over any inconsistent or repugnant provision of law made by the State Legislature in respect of any matter under List II. Senior Counsel submitted that the Kerala General Sales Tax Act has been enacted by the State of Kerala under entry 54 of List II of the VII Schedule and the provisions of the Kerala Act particularly Section 26B cannot nullify the provisions of the RDB Act enacted by the Parliament under Union List of the Constitution. Counsel submitted that Article 246(1) of the Constitution confers overriding exclusive power on the Parliament to make laws with respect to matters in list I and the laws made by the Parliament in respect of matters in list I will prevail over laws made by the State under List II of State List. Senior Counsel submitted that the State Legislature cannot nullify the provisions contained in the RDB Act enacted by the Parliament and therefore Sections 26B and 26A of the Act are ultra vires, unconstitutional and void. In support of his contention Senior Counsel also made reference to the decisions of the apex court in Union of India and another v. Delhi High Court Bar Association and others (2002) 4 S.C.C. 275) and Medical Council of India v. State of Karnataka and

others (1998) 6 S.C.C. 131).

2. Sri P.V. Surendranath, counsel appearing for the appellant in W.A. No 259 of 2007, has also adopted the same argument and referred to the decision of the apex court in Allahabad Bank v. Canara Bank and another (2000) 4 S.C.C. 406) and submitted that the principle laid down by the apex court upholding the overriding effect in the RDB Act vis-a-vis the Companies Act would squarely apply to this case. Counsel referred to Section 34 of the RDB Act and submitted that the provisions of the said Act shall have effect notwithstanding anything inconsistent therewith contained in any other law or in any instrument having effect by virtue of any law other than RDB Act.

3. Sri V.V. Asokan, Senior Government Pleader for Taxes, placed heavy reliance on the decision of the apex court in Dena Bank v. Bhikhabhai Prabhudas Parekh and Co. (2000 (5) SCC 694) as well as various decisions of this court cited above and submitted that both Sections 26A and 26B of the Act are consequently valid. Counsel submitted that Division Bench of this court has held that the above mentioned provisions are constitutionally valid and overrides the provisions of the RDB Act. With regard to the contention that RDB

Act has got overriding effect counsel placed reliance on the decision of the Bombay High Court in Thane Janata Sahakari Bank Limited v. Commissioner of Sales Tax and others (2006) 148 STC 32) and submitted that in the absence of any specific provision in the RDB Act conferring first charge for the Bank, the first charge created under the Kerala General Sales Tax Act, will hold the field. Counsel submitted that RDB Act is a procedural Act and there is no question of any overriding effect over the Kerala General Sales Tax Act.

4. We heard counsel on either side at length. Following the various decisions of the apex court this court took the view that the State has got priority in the matter of recovery of sales tax due by proceeding against the properties mortgaged to financial institutions and the banks. So the only question that is germane for consideration in this case is whether RDB Act has got overriding effect over the Kerala General Sales Tax Act. RDB Act is enacted by the Parliament in exercise of the legislative powers conferred on it under entry 45 of List I of the Constitution of India and that Kerala General Sales Tax Act 1963 was enacted by the State Legislature in exercise of the powers conferred on it under entry 54 List II of the Seventh schedule. In Allahabad Bank's case, supra it has been held

that RDB Act has been enacted for speedy recovery of the amount due to the Banks and financial institutions. The intention of enacting RDB Act is not to give any precedence to the dues to the Banks and financial institutions. RDB Act provides for expeditious adjudication and recovery of debts due to banks and financial institutions without following the cumbersome procedure that may be taken in the civil court. RDB Act has been enacted under entry 45 of List I of the VII Schedule of the Constitution of India and the Kerala General Sales Tax Act 1963 was enacted under entry 54 of List II of the VII Schedule of the Constitution of India. The purpose of the RDB Act is for speedy recovery of the amount and not for creation of any statutory charge for banks or financial institutions. In the absence of any conferment of statutory charge neither the banks nor financial institutions can have any priority.

5. We are of the view, there is no conflict between the provisions of the Kerala General Sales Tax Act and the RDB Act in the matter of recovery of dues to banks and financial institutions. Both the Kerala General Sales Tax Act as well as the RDB Act have been enacted by competent Legislature for different purposes in different fields. It is apposite to refer to the view taken by the

Bombay High Court in Thana Janata Sahakari Bank's case, supra. Contention was raised in that case that there is conflict between the provisions of Section 38C of the Bombay Sales Tax Act and Section 35 of the Securitisation Act, 2002. Negativing the contention the court has taken the view that intention of the Legislature in enacting the 2002 Act is not to give precedence to dues of banks and financial institutions over statutory dues. Section 35 of the 2002 Act does not override section 38C of the Bombay Sales Tax Act. We are informed that the above judgment was taken up in appeal before the apex court in SLP 8910 of 2006 and the same is pending. Judgment of this court in Rajmohan's case, supra is also pending consideration before the apex court. Constitutional validity of Section 26A and Section 26B has already been upheld by this court. We are in full agreement with the principle laid down by the Bombay High Court in Thana Janata Sahakari Bank's case. In such circumstances we find no reason to grant the reliefs prayed for in these appeals. Counsel appearing for the appellant in W.A.No 259 of 2007 referred to the interim order passed by this court on 22.02.2007 by which sixth respondent was directed to retain only Rs 11,47,506/- out of Rs 75,70,000/- towards sales tax. Let this matter

be considered by the recovery officer after after meeting the liability of the State. Appeals are dismissed.

Sd/-

K.S.RADHAKRISHNAN
Ag. Chief Justice

Sd/-

M.N.KRISHNAN
Judge

13/04/2007
en/

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